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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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Honorable Ricky McElwain
Chairman, Crenshaw County Commission
Post Office Box 227
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**SEE ACT 2015-53, WHICH AMENDS
SECTION 11-3-5 OF THE CODE OF
ALABAMA.**

County Commissions – Competitive Bid
Law – Conflicts of Interest – Contracts

There is no statutory prohibition against the Crenshaw County Commission accepting bids and contracting with a company owned by a county commissioner, as long as the county commissioner owning the company does not vote on, or in any manner participate in, the transaction.

Although not statutorily prohibited, under common law a county commissioner should not financially benefit from the business of the county commission.

Dear Mr. McElwain:

This opinion of the Attorney General is issued in response to your request on behalf of the Crenshaw County Commission.

QUESTION

May the Crenshaw County Commission accept bids from and contract with a business owned by a sitting county commissioner for the supply of concrete?

FACTS AND ANALYSIS

According to your request, a local concrete supply company owned by a sitting county commissioner desires to submit a bid to supply concrete for the county. The county, prior to the election of the owner to the county commission, has periodically contracted with the business. The business is the only supplier of concrete located within the county, and it is the belief of the

county commission that purchasing concrete from the local business will save the county substantial costs.

Various provisions of the Code of Alabama address conflicts of interests relative to this inquiry. This Office has previously determined that section 41-16-60 of the Code is a "flat prohibition against a public official being financially interested in a contract with the public body with which he is associated and whether the public official recused himself from the public body's action with respect to such contract is irrelevant." Opinion to Honorable William W. Dillard, Jr., Chief Examiner, Department of Examiners of Public Accounts, dated April 12, 1978, 171 Op. Att'y Gen. 11 (1978), 1978 WL 17711.

In 2011, however, the Legislature amended section 41-16-60 of the Code, eliminating the reference to "the governing boards of instrumentalities of counties and municipalities." 2011 Ala. Acts 2011-583, 1279. Accordingly, although this statute previously prohibited a county commissioner from having a financial interest in any contract of the commission, such prohibition no longer exists in this statute. ALA. CODE § 41-16-60 (Supp. 2012); *see also*, opinion to Honorable Charles P. Gaines, Attorney, The Public Park Authority of the Cities of Lincoln and Talladega, dated July 25, 2011, A.G. No. 2011-081 (acknowledging amendment, but not discussing common-law conflict of interest discussed below).

Section 11-3-5 of the Code prohibits a county commissioner from awarding a contract to a family member. It states the following:

Any member of any county commission who shall award any contract in which the county of such commissioner is interested to any person related either by blood or marriage within the fourth degree to such commissioner or who shall employ any such relative to do any work for said county or to act as agent for any such member in any work in which such county is interested shall be guilty of a misdemeanor and, on conviction, shall be fined not less than \$10.00 nor more than \$100.00.

ALA. CODE § 11-3-5 (2008). The Alabama Supreme Court has held that section 11-3-5 of the Code applies to the individual commissioners of the county commission. *Garrison v. Sumners*, 223 Ala. 17, 134 So. 675 (1931). The Court, however, also held that the prohibitions contemplated by this statute do not apply if the commissioner does not vote on the matter. *Id.* at 676; *see also*, opinion to Honorable Royce G. King, Probate Judge/Commission Chairman, Blount County, dated April 17, 2001, A.G. No. 2001-153 (determining that the probate judge, sitting as commissioner, did not violate this statute if he or she did not participate or vote on the issue).

Section 13A-10-62 of the Code criminalizes the failure of a public official to disclose a conflict of interest. This section states as follows:

(a) A public servant commits the crime of failing to disclose a conflict of interest if he exercises any substantial discretionary function in connection with a government contract, purchase, payment or other pecuniary transaction without advance public disclosure of a known potential conflicting interest in the transaction.

(b) A "potential conflicting interest" exists, but is not limited to, when the public servant is a director, president, general manager or similar executive officer, or owns directly or indirectly a substantial portion of any nongovernmental entity participating in the transaction.

(c) Public disclosure includes public announcement or notification to a superior officer or the Attorney General.

(d) Failing to disclose a conflict of interest is a Class A misdemeanor.

ALA. CODE § 13A-10-62 (2006). In interpreting this section, this Office has consistently stated that a county commissioner with a conflict of interest may avoid violating this statute if, at the very least, he or she makes public disclosure of the conflict of interest before the transaction is commenced and recuses himself or herself from voting on or participating in the transaction. Opinions to Honorable J. Lee McPhearson, Attorney, Choctaw County Commission, dated May 16, 2007, A.G. No. 2007-097; Honorable Hobson Manasco, Jr., Attorney, Winston County Commission, dated March 1, 2006, A.G. No. 2006-062; Honorable Thomas T. Gallion, III, Attorney at Law, dated August 30, 1991, A.G. No. 91-00381.

Although not specifically prohibited by the statutes discussed above, this Office has previously recognized the existence of a common-law prohibition against conflicts of interest. In those opinions, this Office opined that a public official should not financially benefit from business done with the governing body of which he or she is a member. *Manasco* at 2; Honorable Edwin L. Davis, Macon County Attorney, dated August 8, 1989, A.G. No. 89-00394.

Moreover, this Office has also determined that public officials should avoid the appearance of impropriety. Opinions to Honorable Oscar Crawley,

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Mayor, City of Lanett, dated October 2, 2012, A.G. No. 2013-002; Honorable Jeffrey C. Smith, Attorney, Town of Brookwood, dated March 29, 2002, A.G. No. 2002-192. As the owner of the concrete supply company, the county commissioner in question may enjoy a direct financial benefit should the county commission purchase concrete from his or her company. This financial benefit, regardless of abstention, would create an appearance of impropriety and should be avoided.

Finally, your question may also invoke various provisions of the Ethics Law. This Office does not answer questions regarding the State Ethics Law as questions regarding that law are answered by the Alabama Ethics Commission. *Manasco* at 4. Accordingly, you should also address your question to the Alabama Ethics Commission.

CONCLUSION


There is no statutory prohibition against the Crenshaw County Commission accepting bids and contracting with a company owned by a county commissioner, as long as the county commissioner owning the company does not vote on, or in any manner participate in, the transaction.

Although not statutorily prohibited, under common law a county commissioner should not financially benefit from the business of the county commission.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Ben Baxley of my staff.

Sincerely,

LUTHER STRANGE
Attorney General
By:


BRENDA F. SMITH
Chief, Opinions Division

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